

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

Case No. SC08-1278
[TFB Case Nos. 2008-90,049 (02S);
2008-90,094 (02S)]

v.

GARY ELVIN DOANE,
Respondent.

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, a final hearing was held on February 6, 2009. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar - Jan K. Wichrowski and Keshara Darcel Davis

For The Respondent - *pro se*

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent Is Charged: After considering all the pleadings and evidence, pertinent portions of which are commented on below, this referee finds:

As to All Counts

1. Respondent, is, and all times mentioned in the Bar's Complaint of Minor Misconduct in this matter, was a member of The Florida Bar, admitted May 31, 1977, whose birth date is October 4, 1952 and respondent is subject to the jurisdiction of the Supreme Court of Florida. (Stipulation of Facts).

2. Respondent filed his proposed telephone book yellow pages advertisement using the name “Legal Expert, L. L. C.” with the bar’s standing committee on advertising on April 13, 2005. At this point in time, respondent was practicing law as a sole practitioner and his firm’s trade name used the singular form of the word “expert” in this particular advertisement. Respondent’s telephone book listing, however, used the plural form of the name “expert” thus indicating he practiced law with more than one attorney. (Stipulation of Facts attachment L).
3. On May 2, 2005, The Florida Bar advised respondent in writing that his proposed use of the trade name “Legal Expert, L. L. C.” was a violation of the Rules Regulating The Florida Bar because a law firm could not be board certified as implied by the use of the term “expert.” (Stipulation of Facts attachment K).
4. Respondent disagreed with the bar’s position and the bar advised respondent that the Standing Committee on Advertising would review the matter. (Stipulation of Facts attachment M and attachment N).
5. The Standing Committee on Advertising considered respondent’s position that the use of the trade name “Legal Expert” did not violate the Rules Regulating The Florida Bar and upheld staff’s position that the trade name was prohibited by R. Regulating Fla. Bar 4-7.2(c)(3) and 6-3.4(c) because a law firm could not be board certified. The bar advised respondent of the committee’s decision in writing on July 1, 2005. The letter further advised respondent that, although the opinion was advisory only, use of the advertisement/trade name could result in disciplinary action against him and the committee’s opinion could be presented into evidence. Respondent also was advised of his right to seek review of the committee’s opinion within 30 days by the Board of Governors of The Florida Bar. (Stipulation of Facts attachment O).
6. No evidence was presented indicating respondent sought a review by the Board of Governors of The Florida Bar of the adverse opinion of the Standing Committee on Advertising.
7. Respondent continued using the trade names/law firm names “Legal Expert” and/or “Legal Experts” after receiving the opinion of the

Standing Committee on Advertising that this constituted a violation of the Rules Regulating The Florida Bar. Respondent was on notice that his continued use of the trade name/law firm name could result in further disciplinary proceedings against him. (Stipulation of Facts).

8. In fact, further disciplinary proceedings were brought against respondent by The Florida Bar concerning his use of the trade name/law firm name. (Stipulation of Facts attachment P).
9. On October 27, 2005, the Ninth Judicial Circuit Grievance Committee “D” issued a Notice of No Probable Cause and Letter of Advice to Accused in The Florida Bar File No. 2005-31,400 (09D). Although the committee voted not to file further disciplinary proceedings against respondent, it specifically advised him that “its finding does not indicate that it condones [respondent’s] conduct in this matter.” The committee further advised respondent to exercise care in his use of trade names and “strongly [recommended] that [respondent] modify [his] current trade name to accurately reflect [his] area of certification as a civil trial attorney to help avoid creating unjustified expectations about the results [he could] achieve or otherwise [mislead] the public about [his] legal expertise.” (Stipulation of Facts attachment P).
10. On April 3, 2006, respondent filed with the Standing Committee on Advertising his telephone book yellow pages advertisement using the trade name/law firm name “Legal Experts.” His letterhead for the cover letter enclosing the advertisement also reflected the plural use of the word “expert” in his trade name. (Stipulation of Facts attachment Q).
11. The bar advised respondent on May 15, 2006, that this advertisement did not comply with the Rules Regulating The Florida Bar because a law firm could not be board certified, respondent’s area of certification was not specified, and the use of the plural word “experts” was misleading because it implied respondent practiced with at least one other attorney when in fact respondent was a sole practitioner. (Stipulation of Facts attachment S).

12. Respondent again advised the bar that he disagreed with staff's opinion and sought review by the Standing Committee on Advertising. (Stipulation of Facts attachment T).
13. For a second time, the Standing Committee on Advertising reviewed respondent's trade name/law firm name. (Stipulation of Facts attachment T).
14. On July 20, 2006, the bar advised respondent in writing that the committee determined his use of the trade name "Legal Experts" violated R. Regulating Fla. Bar 4-7.2(c)(3) because it failed to include his area of certification and because a law firm could not be board certified. It also violated R. Regulating Fla. Bar 4-7.10(b) and 4-7.2(b)(1) because respondent was a sole practitioner and the name implied otherwise. Again, the bar advised respondent that his continued use of the trade name could result in further disciplinary proceedings against him and of his right to appeal this determination within 30 days to the Board of Governors of The Florida Bar. (Stipulation of Facts attachment U). There is no evidence respondent chose to seek appeal by the board of governors. Instead, respondent continued using the trade name.
15. The bar brought further disciplinary proceedings against respondent for his use of the trade name "Legal Experts." (Stipulation of Facts attachment V).
16. On December 27, 2006, the Ninth Judicial Circuit Grievance Committee "D" issued a Notice of No Probable Cause and Letter of Advice to Accused again declining to institute formal disciplinary proceedings against respondent and again advising him that he needed to comply with all future "opinions and directions from the Standing Committee on Advertising" regarding his advertisement/trade name "without delay." Respondent was advised that his failure to do so could result in future charges and formal disciplinary action against him and that this advisory letter from the grievance committee "should not be viewed as exoneration, but rather should be considered as forewarning that all of The Florida Bar rules and regulations relating to advertisements must be followed by all Florida Bar members." The committee advised respondent that its recommendation of no probable cause was not a finding that

respondent's advertisement complied with the Rules Regulating The Florida Bar, but merely signified that the committee did not have sufficient evidence to proceed with prosecution at that time. (Stipulation of Facts attachment V).

17. Respondent's use of the trade name/law firm name "Legal Expert" and/or "Legal Experts" has continued, unabated, to this day. (Stipulation of Facts attachment B, attachment C, attachment D, attachment E, attachment F, attachment G, attachment H, attachment I, and attachment J).
18. After these proceedings were commenced against him, respondent again filed his telephone book yellow pages advertisement with the Standing Committee on Advertising on March 27, 2008. The advertisement contained the trade name/law firm name "Legal Experts, P. L." The advertisement also included respondent's web site address of www.legalexpert.cc. (Stipulation of Facts attachment XYZ).
19. The bar advised respondent on April 10, 2008, that his advertisement did not comply with the Rules Regulating The Florida Bar. The bar again advised respondent that a law firm could not be board certified, thus his trade name and his web site address both violated R. Regulating Fla. Bar 4-7.2(c)(6). His trade name violated R. Regulating Fla. Bar 4-7.9(b) and 4-7.2(c)(1) for being misleading because he practiced law as a sole practitioner and use of the word "experts" implied otherwise.
20. After April 30, 2008, respondent changed his firm name to "Legal Expert, L. L. C." although not all of the venues bearing his prior law firm name were changed. Respondent's website, for example, continued to bear the name "Legal Experts, P. L." in January, 2009. It was respondent's intention to change the name on all venues and the website. However, other venues containing the old name existed through oversight or inability to change only. Regardless of whether respondent used the singular or plural form of the word "expert," he was advised by the bar in 2005 that it considered the use of the word as part of respondent's law firm name or trade name to be a violation of the Rules Regulating The Florida Bar. (Stipulation of Facts).

21. Therefore, respondent's trade name/ law firm name has remained essentially unchanged since 2005, i.e., he sometimes uses the name "Legal Expert" and other times the name "Legal Experts." Respondent's position that this trade name, in either the plural or singular form, is permissible and for this reason he has refused to refrain from using it despite having been advised to do so by The Florida Bar on no less than 7 occasions.

As to Count I – Misleading Trade Name

22. Respondent intentionally used the firm name "Legal Experts" and/or "Legal Experts, P. L." from 2005 through April 30, 2008. The name appeared on respondent's office signs, letterhead and envelopes, pleadings, website, telephone book listings and advertisements. (Stipulation of Facts).
23. Respondent employed no other attorneys between 2005 and April 30, 2008. Therefore, respondent practiced law as a sole practitioner. (Stipulation of Facts).
24. The firm name "Legal Experts" is misleading because it implies there is more than one attorney in respondent's law firm.
25. The firm name "Legal Experts" is misleading because it implies that all attorneys in respondent's law firm are experts in all legal fields.
26. Respondent is the only attorney in his law firm and he is board certified in only one area of law – civil trial. Respondent is not an expert in every field of law. (Stipulation of Facts).
27. Respondent's occasional inclusion of his area of certification (i. e. on his signage) does not cure the inherent defect in his trade name. Clearly respondent's intent is for the general public to view him as being an expert in the law in general as compared to other attorneys.

As to Count II – Improper Use of Term "Experts" in Firm Name

28. Respondent has been Board Certified by The Florida Bar in the area of Civil Trial Law since 1990 but is not and has never been Board Certified in any other areas of law. (Stipulation of Facts).

29. There are 22 different areas of specialty in which a lawyer may be board certified by The Florida Bar. (Stipulation of Facts).
30. Respondent's firm name is misleading by stating that he is an expert generally when he is board certified in only one area of law – civil trial. Because respondent is board certified in only one of these 22 areas, he cannot claim to be an expert in the other 21 areas of specialty recognized by The Florida Bar.
31. A Florida law firm cannot be board certified or described as expert or experts as this is prohibited by R. Regulating Fla. Bar 6-3.4(c). An individual member of the bar may do so as long as this is truthful. (Stipulation of Facts).
32. A law firm cannot be described as “experts” or “specialists” because only individual attorneys may describe themselves as an “expert” or “specialist” only in their area of board certification generally. (Stipulation of Facts).

III. Recommendations as to Whether the Respondent Should Be Found Guilty:
As to each count of the complaint, this referee makes the following recommendations as to guilt or innocence:

As to Count I

I recommend respondent be found guilty and specifically that he be found guilty of violating the following Rules Regulating The Florida Bar: 4-7.2(c)(1)(A) A lawyer shall not make or permit to be made a false, misleading, or deceptive communication about the lawyer or the lawyer's services. A communication violates this rule if it contains a material misrepresentation of fact or law; 4-7.9(a) A lawyer shall not use a firm name, letterhead, or other professional designation that is false, misleading, or deceptive as set forth in subdivision (c)(1) of rule 4-7.2; and 4-7.9(b) A lawyer may practice under a trade name if the name is not deceptive and does not imply a connection with a government agency or with a public or charitable legal services organization, does not imply that the firm is something other than a private law firm, and is not false, misleading, or deceptive as set forth in subdivision (c)(1) of rule 4-7.2. A lawyer in private practice may use the term "legal clinic" or "legal services" in conjunction with the lawyer's own

name if the lawyer's practice is devoted to providing routine legal services for fees that are lower than the prevailing rate in the community for those services.

As to Count II

I recommend respondent be found guilty and specifically that he be found guilty of violating the following Rules Regulating The Florida Bar: 4-7.2(c)(6)(A) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is "certified," "board certified," a "specialist," or an "expert" except as follows: A lawyer who complies with the Florida certification plan as set forth in chapter 6, Rules Regulating The Florida Bar, may inform the public and other lawyers of the lawyer's certified areas of legal practice. Such communications should identify The Florida Bar as the certifying organization and may state that the lawyer is "certified," "board certified," a "specialist in (area of certification)," or an "expert in (area of certification);" and 6-3.4(c) All requirements for and all benefits to be derived from certification are individual and may not be fulfilled by or attributed to a law firm of which the certified lawyer may be a member.

As to Both Counts

I have considered Respondent's arguments that assert his innocence. Respondent cites *The Florida Bar v Fetterman*, 439 So. 2d 835 (Fla. 1983), to support his position, the case is factually distinguishable from respondent's situation. Mr. Fetterman used the words "The Law Team, Evan Fetterman and Associates" in advertising and identified his law practice as "Fetterman and Associates." Mr. Fetterman, unlike respondent, employed at least one salaried attorney at all times applicable. The Supreme Court of Florida found that although Mr. Fetterman's use of the plural word "Associates" was not technically accurate at all times, because on some occasions he employed only one associate attorney, it was not a material misrepresentation as contemplated by the Rules Regulating The Florida Bar and the name of the firm was accurate at the time he first began using it because he employed two associates. I find it factually distinguishable from this case because Respondent at no time employed any other attorney and the term "Experts" sends a much more important message to the public than "Associates" and warrants sanctions in the particular facts of this case.

IV. Rule Violations Found: **COUNT I** - 4-7.2(c)(1)(A); 4-7.9(a), and 4-7.9(b). **COUNT II** – 4-7.2(c)(6)(A). My review of 6-3.4(c) indicates that this rule is aimed at limiting the powers of the bar entities to certify a law firm and that the other rules already address this issue.

V. Recommendation as to Disciplinary Measures to Be Applied: I recommend respondent be admonished for minor misconduct by letter from the Chair of the Second Judicial Circuit Grievance Committee “S” and that he attend the next scheduled Advertising Workshop. As a probationary term, I further recommend respondent file and obtain approval of all his advertisements with the Standing Committee on Advertising of The Florida Bar **before** publication or dissemination of those advertisements for a period of one year from the date of the order of the Supreme Court of Florida in this matter. Such probation shall be unsupervised and non-reporting. I note that respondent is board certified. I make no recommendation as to whether or not this should be revoked and leave this to the discretion of the Civil Trial Board Certification Committee.

In making my recommendation, I considered the following Florida Standards for Imposing Lawyer Sanctions and the fact that this was a complaint of minor misconduct:

13.0 Standards for Imposing Lawyer Sanctions in Advertising and Solicitation Rule Violations

13.1 Diversion to a practice and professionalism program or minor misconduct is appropriate:

(f) when an advertisement:

(5) contains a law firm name that is prohibited by the Rules Regulating The Florida Bar; or

(13) fails to disclose material information that is necessary to prevent the advertisement from being actually or potentially false or misleading.

13.3 Suspension is appropriate:

(c) when an advertisement:

(1) contains a material misrepresentation or omission of facts necessary to avoid a material misrepresentation;

(3) contains statements that are directly or impliedly false or misleading; or

(4) contains unfair or deceptive statements or claims.

In mitigation, under Standard 9.32, I have considered the following:

(a) absence of prior disciplinary record; as well as respondent's assertion that he has been active in pro bono activities. I also have considered as mitigation the lack of law guiding respondent in this area of advertising.

In aggravation, under Standard 9.22, I have considered the following:

(c) pattern of misconduct in that respondent has repeatedly used his trade name in telephone book advertising media that require him to annually renew the listing; and

(i) substantial experience in the practice of law.

I have considered the following case law in making my recommendation:

In *The Florida Bar v. Doe*, 634 So. 2d 160 (Fla. 1994), an attorney was admonished for engaging in improper advertising. The attorney paid to place an advertisement in a weekly newspaper that he characterized as being a public service announcement that was exempt from the filing requirement. The court found that the attorney's article constituted an advertisement, requiring filing, because he paid a significant amount of money to the newspaper to obtain publication, he derived a substantial portion of his business from the area of law his article discussed, and he prominently displayed his name, occupation, business address and telephone number in the article and advised the reader to "clip and save" the article for future reference. In mitigation, the attorney had no prior disciplinary history, provided public service, and did not obtain any new clients through the publication of the article. The court noted that normally admonishments are not published, but did so in this case in order to provide guidance and instruction for other attorneys.

In *The Florida Bar v. Herrick*, 571 So. 2d 1303 (Fla. 1990), an attorney was publicly reprimanded for mailing a direct mail solicitation letter that failed to comply with the rules in that it was not marked as being an advertisement and that stated his law firm "specialized" in customs law. Mr. Herrick was not board certified or designated in any area of law.

VI. Personal History and Past Disciplinary Record: After the finding of guilt and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(m)(1)(D), this referee considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 56

Date admitted to bar: May 31, 1977
Prior disciplinary convictions and disciplinary
measures imposed therein: None

VII. Statement of Costs and Manner in Which Costs Should be Taxed: this referee finds the following costs were reasonably incurred by The Florida Bar.

A. Referee Level Costs	
1. Court Reporter Costs	\$ 650.50
2. Bar Counsel Travel Costs	\$ 172.46
C. Administrative Costs	\$ 1,250.00
D. Miscellaneous Costs	
1. Investigator Expenses	\$ 92.50
2. Copy Costs	\$ <u>75.00</u>
TOTAL ITEMIZED COSTS:	\$ 2,240.46

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar. It is further recommended that respondent shall be deemed delinquent and ineligible to practice law pursuant to R. Regulating Fla. Bar 1-3.6 for failure to timely pay the costs assessed in this proceeding.

Dated this _____ day of _____, 2009.

Philip J. Yacucci, Jr., Referee

Original to Supreme Court with Referee's original file.

Copies of this Report of Referee only to:

Jan K. Wichrowski, Bar Counsel, The Florida Bar, 1200 Edgewater Drive,
Orlando, Florida, 32804-6314

Keshara D. Davis, Bar Counsel, The Florida Bar, 1200 Edgewater Drive, Orlando,
Florida 32804-6314

Gary Elvin Doane, Respondent, Legal Expert LLC, 738 W Colonial Drive,
Orlando, Florida 25460

Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, 651 East Jefferson
Street, Tallahassee, Florida 32399-2300



THE FLORIDA BAR

1200 EDGEWATER DRIVE
ORLANDO, FL 32804-6314

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

LAWYER REGULATION DEPARTMENT 407/425-5424
UPL DEPARTMENT 407/425-0473
WWW.FLABAR.ORG

February 17, 2009

The Honorable Philip James Yacucci, Jr.
222 Courthouse Addition
218 S. Second Street
Ft. Pierce, FL 34950

RE: The Florida Bar v. Gary Elvin Doane
Case No. SC08-1278
TFB Case Nos: 2009-90,049 (02S); 2009-90,094 (02S)

Dear Judge Yacucci:

Please find enclosed a proposed Report of Referee in the above named case, as requested. By copy to Mr. Doane, he is requested to contact each of us by February 20, 2009 if he has any objections. A CD of the proposed Report of Referee is also enclosed.

Please note that your entire file including an Index must be forwarded to the Supreme Court of Florida along with your signed order. The Supreme Court of Florida also requires your final Report of Referee to be e-filed with them at e-file@flcourts.org with the case number shown on the subject line.

Copies of the Report of Referee only for respondent and myself, as well as our headquarters office, are also enclosed with self-addressed stamped envelopes.

Please do not hesitate to contact me should you have any questions or comments.

Sincerely yours,

Keshara Darcel Davis
Bar Counsel

Enclosures

cc: Gary Elvin Doane - w/enclosures

Jan K. Wichrowski
The Florida Bar
1200 Edgewater Drive
Orlando, FL 32804

Gary Elvin Doane
Legal Expert Llc
738 W Colonial Drive
Orlando, Fl 25460

Kenneth Lawrence Marvin, Staff Counsel
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300